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No. 126

Supreme Court of the United States.

OCTOBER TERM, 1943.

THOMAS P. NICHOLS & SON COMPANY,
Petitioner,

v.

THE NATIONAL CITY BANK OF LYNN
AND
FEDERAL DEPOSIT INSURANCE CORPORATION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS

AND

BRIEF IN SUPPORT THEREOF.

ARTHUR V. GETCHELL,
WILLIAM G. TODD,
WILLIAM HERBITS,
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PETITION FOR WRIT OF CERTIORARI TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

To the Honorable the Justices of the Supreme Court of the United States:

The petition of Thomas P. Nichols & Son Company respectfully shows:

Summary Statement of Matters Involved.

The petitioner originally brought proceedings against the respondent, The National City Bank of Lynn, on November 2, 1936. This action resulted in the entry of judgment for the petitioner on January 8, 1940, in the sum of approximately $42,000, execution issuing therefor on January 9, 1940. Pending the hearing on the merits of this action, The National City Bank, hereinafter called the Bank, by appropriate resolutions, had entered into a voluntary liquidation of its affairs on December 3, 1938.

The Bank was organized and existing under the banking laws of the United States, and its deposits were insured by the respondent Federal Deposit Insurance Corporation, hereinafter called the Corporation.

The petitioner was unable to satisfy its execution after appropriate demand upon the liquidating Bank, finding that the assets of the Bank, by virtue of an agreement between it and the Corporation, had been transferred and assigned to the Corporation as security for the repayment of a loan made for the purpose of facilitating the voluntary liquidation, under the Federal Reserve Act, section 12 B (*n*) (4), 12 U.S.C. sec. 264 (*n*) (4).

The petitioner thereupon brought the present proceeding in equity against said respondents to enforce payment of its execution by the Corporation out of the Bank's assets or their proceeds in the hands of the Corporation, or otherwise. This equity proceeding was heard by a judge of the Superior Court, sitting without jury, who denied to the plaintiff the relief sought, and limited it in its attempt to secure satisfaction of its execution to the assets of the Bank, but subject to such right, title, and interest as the Corporation had in and to said assets.

The petitioner appealed from the final decree entered in said case to the Supreme Judicial Court of the Commonwealth of Massachusetts, which rendered an opinion (1943 Mass. Adv. Sh. p. 449) which appears in the record submitted herewith, confirming the decision of the lower court.

Jurisdiction.

Since this is an action involving the interpretation and construction of the provisions of section 12 B of the Federal Reserve Act, as amended, and more particularly paragraph (4) of subsection (*n*) of said section, and as the decision of the Supreme Judicial Court of Massachusetts

affects the rights of shareholders and creditors to the assets of a national bank in voluntary liquidation, and since the case cannot be decided on any independent ground of local law, and since it would also seem that the case presented involves a question of validity under the due process clause of the Constitution of the United States, Amendment XIV, sec. 1, it is submitted that the jurisdiction of this court to review said decision is properly invoked under federal laws (Judicial Code, sec. 237 (*b*), 43 Stat. 937, 28 U.S.C. sec. 344). Furthermore, the question presented seems to be a unique and novel one and never before presented to this court for adjudication, and if the decision in respect to the case is sustained, it is repugnant to the many decisions establishing the rights of creditors to share pro rata in the assets of a national bank in voluntary liquidation.

Questions Presented.

1. Did Congress by the amendment of the Federal Reserve Act, sec. 12 B (*n*) (4), intend to confer upon the Corporation the right to arbitrarily discriminate against creditors and depositors of a national Bank in voluntary liquidation under a plan conceived, dictated, supervised and consummated by the Corporation in order to reduce the risk or avert a threatened loss to it?

2. Did Congress under said amendment, subsection (*n*) (4), authorizing the Corporation to make loans upon such terms and conditions as it may determine, which loans "may be in subordination to the rights of depositors and other creditors," intend by this clause to permit the Corporation to elect and prefer certain creditors and depositors to whose claims it would subordinate its rights, and who would be paid in full to the utter exclusion of other creditors and depositors, who would receive nothing?

3. If as matter of fact in the liquidation plan the parties thereto fully intended and desired to provide for the full payment of the Bank's obligations to all depositors and creditors, but through inadvertence, mistake or negligence the liquidation agreement failed to provide for certain creditors or depositors or certain classes thereof, are the latter then precluded from ratably participating with other creditors and depositors in the assets of the Bank, or will not equity regard that as done which it was intended to do and which ought to have been done and restore to such excluded claimants their rights to equal participation as originally contemplated and intended by the parties to the plan?

4. If the findings of fact by the trial judge justify the conclusion that the Corporation actually subordinated its rights under the loan agreement to those of all creditors and depositors, but through misconception, inadvertence, mistake or negligence the plaintiff's claim was not provided for in any written contract and such contracts were unambiguous as decided by the Supreme Judicial Court of Massachusetts, is the plaintiff thereby and on that account precluded from participating ratably with other creditors and depositors in the Bank's assets?

5. Can the Corporation, which was created to instill in the public mind confidence in all banking institutions of our country, under the facts and circumstances of the plaintiff's case having set up a plan which was intended to provide for the full payment of creditors and depositors, be relieved of its obligation by an analogy adopted by the Supreme Judicial Court of Massachusetts, which decides in effect that the transaction in this case, being made for a valid consideration, without fraud and while the Bank was solvent, was a common-law transaction creating the relationship of lender and borrower, ignoring the fact that the money advanced in this instance never actually reached

the borrower, never was controlled by the borrower but by the lender, who dictated and controlled not only its disposition but also the disposition of the cash and all other independent assets of the borrower, and alone voluntarily defended the plaintiff's original law action against the Bank, after the consummation of the liquidation plan?

6. Do the facts in this case show a violation of the plaintiff's rights under the due process clause of the Constitution of the United States, Amendment XIV, sec. 1?

Reasons for Granting the Writ.

The decision is not in accord with many decisions of the courts of the United States which hold that voluntary liquidation presupposes payment in full to all creditors and is predicated on that principle.

The decision erroneously interprets that part of subsection (*n*) (4) which permits the corporation to subordinate its rights to those of depositors and creditors to mean that such intention on the part of the corporation must be expressly evidenced in some written instrument; and that it cannot be determined by a resort to the actions and the conduct of the corporation in the particular transaction, regardless of how plainly the intention to so subordinate itself is manifested.

This decision ignores the beneficent character of the corporation as Congress intended it to be and clothes it in the garb of an ordinary money-lending corporation which it is not.

The decision further holds in effect that equity has no right in the present situation to carry out the intention and purpose of the parties to pay in full creditors and depositors of a solvent national bank in voluntary liquidation, and to correct an error or mistake which inadvertently caused a creditor of such bank to be excluded from partici-

pation in the assets of the liquidating bank on a parity with all other creditors, thereby causing the creditor irreparable loss.

If this writ does not issue, a decision against the plaintiff will be sustained which ignores the plan of voluntary liquidation of a solvent national bank which, prior to the execution of a formal contract of loan including a collateral note, had made provision for all other depositors and general creditors who were not included in the corporation's written contract and definitely concludes that the plaintiff cannot prevail because it alone was not mentioned in the subsequent contract or the collateral note.

In other words, it looks to the form of the contract between the corporation and the bank which was only a part of the plan and ignores the substance of the whole transaction which contemplated provision for all depositors and general creditors alike.

This is a matter of great importance to the plaintiff involving a very substantial sum of money, and if the decision of the Supreme Judicial Court of Massachusetts is sustained the plaintiff will be deprived of substantial rights.

Further reasons why this writ should issue are set forth under the heading of "jurisdiction."

Wherefore it is respectfully submitted that the petition should be granted.

ARTHUR V. GETCHELL,
WILLIAM G. TODD,
WILLIAM HERBITS,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Reference to the official report of the opinion in the court below, grounds on which the jurisdiction of this court is invoked, statement of the case, and the questions presented are set forth in the petition.

Argument.

The trial judge who heard and decided the merits of the plaintiff's case filed a memorandum of his findings which appears in the record submitted herewith. (Record, p. 32.)

The findings disclose that the real intention of the parties in the conception of the liquidation plan was to pay all depositors and general creditors in full. (Record, p. 41, Ex. 3.)

The trial judge found that the resolutions authorizing the voluntary liquidation and all instruments effectuating the transaction were dictated by the Corporation, and that the resolutions provided "that it was desired to protect . . . depositors and creditors against additional losses which would be sustained in the event of forced liquidation of its investments and to provide for the full payment of its [the Bank's] obligations to depositors and creditors." (Record, p. 33.)

These findings further state that when the liquidation transactions were accomplished "and at all times prior thereto while plans directed to their accomplishment were being discussed and executed it was the intention of the Bank and its Officers to satisfy all outstanding obligations to general creditors and depositors alike." This was the intention which was later dictated by the Corporation in the resolutions of the directors of the Bank authorizing the liquidation. (Record, pp. 33, 41, Ex. 3.)

Therefore it is established that at the time of the conception of the liquidation plan ending in the dictation of

the resolution by the Corporation and the accomplishment of the plan all creditors and depositors were to be paid and it is significant as bearing upon this intention that these resolutions were never later altered showing any other purpose or intention. (Record, p. 41, Ex. 3.)

In pursuance of the liquidation plan as finally consummated, and as evidenced by the exhibits which are a part of this record, and after their execution, the Corporation provided for the payment in full of all depositors and creditors, except the plaintiff; and the trial judge states that, if it is permissible for him to do so, he draws the inference that the plaintiff's claim was the only one for which provision was not made. (Record, p. 35.)

As matter of fact, the record discloses that the Corporation, in pursuance of the plan, paid to depositors approximately $270,000 more than it would have been obliged to pay under the law as it was originally, section 12 B of the Federal Reserve Act, before the amendment of 1938, subsec. (*n*) (4).

The findings also set forth that all other creditors were paid in full, provision being made therefor by the Corporation, which set up a fund which was expended by the liquidator of the Corporation, "to take care of contingent and unliquidated claims that were pending against the Bank . . . claims anticipated but the amounts of which were uncertain. It was not a fund provided to take care of this plaintiff." (Record, p. 35.)

If, as has been clearly shown, it was the intention of the parties to pay everybody, it is natural to inquire why provision was not made to pay the plaintiff.

The plaintiff's claim was, of course, well known to the Bank, who brought it to the attention of the Corporation. But the Bank, because of information it had received from its counsel, was under the impression that the plaintiff's case had no merit and that ultimately it would result in

judgment for the Bank. The Bank's officials misinterpreted counsel's advice, so that "actually they believed that the plaintiff's case had been concluded, that it was dead and was no longer before the court." (Record, p. 34.) The Corporation "by the exercise of reasonable care and diligence should have known of the status of the plaintiff's claim for a reasonable period of time prior to December 3, 1938," the date it dictated the resolutions authorizing the liquidation, and the trial judge so finds; and it did not take any of the necessary steps set forth by the trial judge to carefully evaluate the claim, but adopted the erroneous conclusion of the Bank relative to the claim. (Record, pp. 35-36.)

Therefore the plaintiff's claim, the existence of which was well known to the parties, *was not included in the list of creditors and was not paid.*

It is remarkable to note that the trial judge states that "it is fair to assume that if it had been appreciated, by any of the parties to the agreement of December 3, 1938, between the Bank and the Corporation, that the plaintiff's claim was outstanding and as meritorious as later it was determined to be, provision would have been made to take care of it." (Record, pp. 34-35.)

It is submitted that the plaintiff has now conclusively shown by the findings of the trial judge that the plan of liquidation was predicated upon the payment in full of all depositors and creditors; that this included the plaintiff, if it was a creditor; that this intention and purpose never changed; that the failure to include the plaintiff and to provide for it in the liquidation plan was due to mistake, misconception and error on the part of the Bank and the Corporation; and that the failure to include the plaintiff's claim was not because the parties did not intend to obligate themselves to pay the claim, as is inferred by the decision of the Supreme Judicial Court of Massachusetts, but only because they wrongfully concluded that the claim was not

then a "living one." Therefore there could not have been an intentional exclusion of the plaintiff, a creditor of the Bank, as it was erroneously thought that the plaintiff was not a creditor; and had it been a creditor in the minds of the parties, the trial judge found that provision would have been made to pay it. (Record, pp. 34-35.)

In many respects the situation here presented parallels that in *Forbes* v. *Thorpe,* 209 Mass. 570, 581, 582, in which a creditor's rights were enforced under an agreement made for his benefit. In that case there were wilful misrepresentations and in the present case misconception, mistake, error or carelessness. The end result is the same.

The Supreme Judicial Court of Massachusetts decides (Record, p. 61) that there was nothing ambiguous about the contract and that a court cannot read into a contract an obligation that was not assumed. But the plaintiff submits that this is not the analogy to control its contentions. If it was meant to include the plaintiff as a creditor and it was not included due to mistake, error, carelessness or inadvertence, equity should do that which was intended and which should have been done. It seems hardly necessary to assert that equity has the power to reform a contract or correct a mistake, and it seems plain that this is the kind of case where such a power should be exercised, having in mind the findings of fact by the trial judge, and the peculiar nature of the transaction.

The Supreme Judicial Court of Massachusetts also decides that when the liquidation contract was entered into it contained no provision for the payment of creditors. However, the fund of $10,000, earlier referred to, and set forth in Exhibit 4, was set up by the Corporation as part of the plan and was meant "to take care of contingent and unliquidated claims that were pending against the Bank on December 3, 1938," the date of the start of the liquidation. It is thus made plain that there were no other creditors

than those provided for by this fund, as the plaintiff was, erroneously, not so considered; and there was therefore no need to mention creditors or provide for them in the contract, creditors and depositors having been provided for before or simultaneous with the execution of the contract.

It is apparent that the parties believed the only real creditors were depositors who were fully provided for in the plan of liquidation.

So the fact that creditors are not mentioned in the contract is of no significance. Had the plaintiff been recognized as a creditor, it would not have necessarily been named in the contract, but in the list of creditors submitted by the Bank as part of its application for the loan and provision otherwise would have been made for it as was done for depositors and other minor creditors who were paid in full, and whose names also do not appear in the contract between the Corporation and the Bank.

The decision of the Supreme Judicial Court of Massachusetts holds in effect that, because the contract between the Bank and the Corporation was not ambiguous, despite the findings of the trial judge the plaintiff has no rights. (Record, p. 61.)

It seems to the plaintiff the decision is against the plaintiff on the sole ground that the transaction was the ordinary bargain and sale, borrower and lender, common-law transaction, which, of course, is not the case, since the money at no time found its way into the controlling possession of the borrower. On the contrary, its disposition and travel had been arranged for by the Corporation prior to the execution of the liquidation contract, and the proceeds of the loan were turned over to another bank to distribute to depositors and minor creditors simultaneously with their receipt from the Corporation, the transfer being but a matter of bookkeeping. (Record, p. 32.)

Had this been the well-recognized borrower and lender transaction, the borrower would have obtained actual possession of the funds, which would then have been available to all creditors for distribution or to reach and apply or the funds would have been ratably distributed to all creditors, if they were insufficient to pay them in full; and the funds would have become trust funds held for the primary benefit of creditors and shareholders.

Peters v. *First National Bank of New London,*
259 N.W. 600, 218 Wis. 126.
George v. *Wallace,* 135 Fed. 286, 292.

It is the contention of the plaintiff that the nature of the transaction in and of itself contemplates a payment out of the assets to all creditors and depositors, because the Bank was solvent and entered into a voluntary liquidation. The Corporation before it entered into the transaction was satisfied of the Bank's solvency, as the record discloses, and was content to take all of its assets or control them after fully acquainting itself with the financial condition of the Bank. If this were not so, the Corporation could at any time take over all the assets of an insured bank, under the guise of solvency, and subsequently, by means of written instruments, exclude creditors from payment of their claims, as in this case, which if they had been included originally might have caused the bank to be insolvent, with consequent receivership as provided by the National Banking Act, entitling the creditor to at least a pro-rata participation in the assets of the bank.

This is practically the situation in the present case, as the plaintiff's claim has not been paid and it is uncertain, if it had been paid, whether the Bank would have been made insolvent, as the value of remaining assets are but book values and they may never produce sufficient actual

proceeds to pay the plaintiff's claim after the satisfaction of the Corporation's loan and liquidation expenses.

In other words, the plaintiff says that a solvent bank which desires to go into voluntary liquidation should be forced to arrange to pay all of its depositors and creditors before being permitted to enter into voluntary liquidation. Otherwise it seems only fair and equitable that it should either keep its doors open or go into receivership as a closed bank and permit creditors to share pro rata in its assets.

> *Merchants National Bank* v. *National Bank of Lillington,* 231 Fed. 556, 558.

The Act of Congress, June 3, 1864, permitting the organization of national banks, intended to secure equality among general creditors in the division of proceeds of the property of the Bank.

> *Steele* v. *Randall,* 19 F. (2d) 40.

And section 12 B of the Federal Reserve Act, as amended, has not in any way changed this doctrine.

On the plaintiff's contention that the Corporation subordinated its rights, in fact, the Supreme Judicial Court of Massachusetts in its decision ignores all of the acts of the Corporation as found by the trial judge and which, it is submitted, show an actual subordination. (Record, p. 62.)

But the plaintiff urges that it is not a question of the interpretation of the contract as it was written which should govern the plaintiff's rights, but the intentions of the parties which were not carried out, due to error and mistake; and it submits that the Corporation's intention to subordinate its rights under the contract is definitely shown by its actions and its conduct generally as found by the trial judge, not the least of which was the voluntary

assumption of the defense of the plaintiff's original case in March of 1939, approximately three months after the liquidation was authorized. Counsel for the Bank no longer participated in the defense of the action after the appearance of counsel for the Corporation. (Record, p. 36.) Subordination is further factually shown by the finding that all depositors and all other recognized creditors were paid in full, so that, so far as the parties to the contract were concerned, when this had been done, the Bank had paid everybody who had a claim against it, which is exactly what the parties intended when the Bank divested itself of all of its assets.

Visualizing the situation at the time of the negotiations leading up to the resolve to liquidate dictated by the Corporation, and at the time of the execution of the contracts, it is not difficult to understand what was sought to be accomplished.

The Corporation was fully informed of all of the Bank's liabilities and assets. The Bank wanted to pay all creditors and depositors in full. It did not want to exclude anybody. The Corporation agreed that there were abundant assets to accomplish this purpose. Therefore the parties agreed that when the loan was made it would be in an amount sufficient to pay any and all claims against the Bank. The loan was made and all of the assets transferred.

Upon this happening the Bank was supposed to be freed of all liabilities of every nature whatsoever and its assets in their entirety had been pledged as collateral security to secure this accomplishment. That this collateral was determined by the parties to be more than sufficient for the desired purpose is found by the trial judge, who states that the book value of the equity of redemption "exceeds the amount of the loan by more than $500,000.00." (Record, p. 36.)

However, as further protection for the Corporation and as further convincing indication that all liabilities were to be paid out of the assets is the admission in the answer of the Corporation filed in the present case that it also took from the Bank an assignment of all claims, actions and choses in action that the Bank had against its officers and directors for damages caused the Bank by their negligent acts, and the further admission that this assignment included any action against said officers and directors for causing the damage to the plaintiff for which it later recovered judgment. (Record, p. 15.)

So the Corporation, having convinced itself beyond any doubt that all obligations of the Bank of every nature and description had been fully provided for, then executed with the Bank *the only kind of instrument which was called for under the then circumstances,* namely, a collateral note agreement pledging all of the assets of the Bank as security for the loan. (Record, p. 50, Ex. 4.)

Is it not then obvious that, had the parties properly appreciated the plaintiff's claim *which was then outstanding and pending trial,* and which the trial judge found as a fact was disregarded and overlooked through error, some provision would have been made to treat the plaintiff as the others were treated, either by setting up a reserve against the contingency of a judgment being rendered in favor of the plaintiff, the ad damnum of plaintiff's writ having been $100,000, or by increasing the $10,000 fund which had been set up to take care of unliquidated and contingent claims, which fund was made an integral part of the liquidation plan although its creation was not provided for in the written contract?

The Supreme Judicial Court of Massachusetts virtually decides that there was an intentional exclusion of the plaintiff from the contract, and therefore from the liquidation plan. (Record, pp. 60-61.)

If this is so, does it not seem reasonable and probable that at some stage of the negotiations, in some instrument or by some notation, the Corporation would have in some manner indicated its unwillingness to treat the plaintiff's claim on a parity with the others?

And there is nothing in any record of the liquidation transaction to indicate any such intention; but there is positive evidence showing why the plaintiff's claim was "overlooked." (Record, p. 35.)

In view of all the foregoing, how can the decision of the Supreme Judicial Court of Massachusetts, which virtually holds that, because the plaintiff was not mentioned in the loan contract, it was intentionally excluded, or how can it logically and reasonably be found that the plaintiff ever should have been named therein had its claim been intelligently considered, in view of the manner in which all other claims were provided for and the general plan of liquidation.

And, furthermore, how can a decision which deprives the plaintiff of its right to participate in parity with other creditors in a voluntary liquidation of a national bank, on the sole ground that the final loan contract intentionally made no provision for the claim and that the plaintiff was not a party to the contract, be sustained, especially when it disregards and ignores the compelling facts showing the nature of the transaction and the intention of the parties as clearly evidenced by the record, and that the only reason the plaintiff was not provided for was because of mistake, error or carelessness? (Record, pp. 33, 34, 35.)

To permit the situation which presently confronts this plaintiff to obtain is to open wide the doors to unlawful preference, discrimination and even fraud, and to defeat the very purposes of the Federal Deposit Insurance Act, in that it would enable the Corporation, in order to reduce its risk or avert a threatened loss, to compel any insured

bank to adopt such terms and conditions as the Corporation may determine under the powers given it by subsection (*n*) (4) of the Act, and situated as the parties were in the present case, would enable the Corporation to discriminate against one or any number of creditors, either deliberately or for any other reason which to it seemed sufficient, thus denying to the creditor, as was done in the present case, his rights to an interest in property in parity with other general creditors of a solvent national bank in voluntary liquidation, in violation of the rights guaranteed him by the due process clause of the Constitution of the United States, Amendment XIV, sec. 1.

But in any event and notwithstanding what the corporation could have done, it did make the loan upon such terms and conditions as it determined, as the act permitted it to do, and the evidence convincingly shows that these terms and conditions contemplated the payment of all liabilities of the bank of every nature and description without any exception or reservation, which would necessarily have included provision for the plaintiff but for error, mistake or negligence.

Regardless of the beneficent character of the corporation, created by Congress mainly for the purpose of instilling confidence in our banking institutions, it is submitted that the Supreme Judicial Court of Massachusetts erred in its decision that the plaintiff's plight, caused through error, mistake or negligence, cannot be remedied or its rights restored under the fundamental laws of equity jurisprudence, and therefore the plaintiff submits its decision should be reversed and an appropriate decree caused to be entered giving the plaintiff the relief prayed for.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 126

THOMAS P. NICHOLS & SON COMPANY, PETITIONER

v.

THE NATIONAL CITY BANK OF LYNN AND FEDERAL DEPOSIT INSURANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF ESSEX COUNTY, COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The findings, rulings, order for decree, and decree of the Superior Court of Essex County, Commonwealth of Massachusetts (R. 32–36, 40), are not reported. The opinion of the Supreme Judicial Court of Massachusetts (R. 56–64) is reported in 48 N. E. (2d) 49.

JURISDICTION

The judgment of the Supreme Judicial Court was entered on March 30, 1943 (R. 65). The petition for a writ of certiorari was filed June 29, 1943. The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Pursuant to a general plan for the liquidation of the National City Bank of Lynn, the Essex Trust Company assumed all deposit liabilities of the Bank and received certain of its liquid assets. The remaining assets were pledged to the Federal Deposit Insurance Corporation for a loan, the proceeds of which were turned over to the Essex Trust Company. Subsequent to these transactions, petitioner obtained a judgment against the Bank and execution was returned unsatisfied. Petitioner thereupon brought suit against the Bank and the Corporation to recover on its judgment. The case presents the following question:

Whether the contract between the Federal Deposit Insurance Corporation and the Bank should be reformed so as to require the Federal Deposit Insurance Corporation to pay petitioner the amount due it under its judgment against the Bank.

STATUTE INVOLVED

Section 12 B (n) (4) of the Federal Reserve Act, as amended, c. 614, 49 Stat. 684, 699 (12 U. S. C. 264 (n) (4)) provides:

> Whenever in the judgment of the board of directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or, with the approval of the Comptroller of the Currency, any receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans.

STATEMENT

During the year 1938, negotiations were in progress between representatives of the National

City Bank of Lynn, Massachusetts, herein referred to as the Bank, and the Federal Deposit Insurance Corporation relative to the proposed voluntary liquidation of the Bank (R. 33). In accordance with the plan eventually adopted and put into effect on December 3, 1938 (R. 32), the deposit liabilities of the Bank were assumed by the Essex Trust Company which received in consideration therefor certain assets of the Bank as well as the proceeds of a cash loan amounting to approximately $1,300,000 made by the Corporation to the Bank (and transferred by the latter to the Essex Trust Company) upon the security of those assets of the Bank not turned over to the Essex Trust Company (R. 32, 33).

On January 8, 1940, a judgment in the sum of $42,102.02, together with costs, was obtained by petitioner against the Bank in a suit commenced on November 2, 1936 (R. 32).[1] Execution upon petitioner's judgment against the Bank having been returned unsatisfied (R. 32), it brought the instant suit against the directors of the Bank, the Essex Trust Company, the Bank, and the Corporation. Demurrers were sustained to the action against the directors (R. 26), and it appears that petitioner discontinued its action against the Essex Trust Company (R. 57). Initially, petitioner's bill of complaint averred that the Bank was in-

[1] The exact nature of the action brought by petitioner does not appear from the record. It was not, however, based upon a deposit obligation and was described by the courts below as one sounding in contract or tort (R. 32, 56).

solvent at the time the loan contract was negotiated (R. 2) and that the pledge of the Bank's collateral to the Corporation was in fraud of creditors (R. 3). During the course of the trial, however (R. 34), and subsequently by formal amendment to the complaint (R. 37), petitioner abandoned its contention that the Bank was insolvent and elected to proceed upon the theory that the loan agreement and the pledge of assets thereunder were for its benefit and were intended to provide for the payment of its claim as a creditor. The Superior Court dismissed the bill of complaint as to the Federal Deposit Insurance Corporation (R. 36, 40), finding that the Bank was solvent at the time that the loan was made (R. 32); that the loan agreement was valid, having been entered into for a fair consideration without fraud or bad faith (R. 35); and that the agreement neither expressly nor impliedly contemplated that the petitioner's claim be paid by the Corporation. The court further held that the Bank held an equity of redemption in the assets pledged to the Corporation, the book value of which exceeded the amount of the loan by more than $500,000 (R. 36). It entered judgment directing the Bank to pay petitioner the sum of $42,136.57, with interest, and restrained the Bank and its liquidating agent, until petitioner's judgment was satisfied, from selling, assigning, or otherwise disposing of any property, including the equity of redemption in the assets pledged to the Corporation, except

such transfers and conveyances as were required to be made to the Corporation pursuant to the provisions of the agreement (R. 40). On appeal, the Supreme Judicial Court of Massachusetts affirmed (R. 65) and on rescript from the Supreme Judicial Court, the Superior Court of Essex County reentered its decree of August 27, 1942 (R. 65–66).

ARGUMENT

It is clear from the record in this case that the sole relief which petitioner seeks is the immediate payment by the Corporation of its judgment claim against the Bank. The record discloses that the Bank is solvent and that the book value of the assets which have been pledged to the Corporation by the Bank exceed by $500,000 the face amount of the loan.[2] Petitioner has obtained a decree in the instant case directing the Bank to pay the judgment as soon as the lien of the Corporation has been satisfied. Consequently, petitioner's contention that it is being deprived of its property without due process of law in contravention of the Fourteenth Amendment (Pet. 5,

[2] The record contains no evidence as to the appraised or liquidating value of the Bank's assets pledged to the Corporation as security for the loan, since this question ceased to be an issue when petitioner abandoned the theory of insolvency and proceeded upon the theory that the Bank was solvent. Petitioner amended its bill of complaint by withdrawing its allegation that the Bank was insolvent and substituting an allegation that the Bank was solvent (R. 37); it apparently introduced no evidence to show that the book value of the assets pledged to the Corporation was other than their true value.

16–17) and its suggestions that other creditors are to be paid in full and that it will receive nothing (Pet. 3, 6, 12–13) find no support in the record and call for no discussion on the part of respondent Corporation.

The gist of petitioner's argument seems to be that it was the intent of the Bank and the Corporation to make provision for the payment of petitioner's claim, that such provision was omitted by inadvertence and mistake, and that the loan contract accordingly should be reformed so as to provide therefor.[3] In the alternative, it appears to urge that if there were no intent to make provision for such payment, such action on the part of the Corporation was in violation of the policy evidenced by both the Federal Reserve Act and the National Bank Act of 1864 and that it should therefore be allowed to recover against the

[3] It is clear from the record that the transactions which contemplated the liquidation of the Bank involved a third party, namely, the Essex Trust Company (R. 32). The arrangements between the Bank and the Essex Trust Company disclosed the persons who were to be paid in the course of the liquidation proceedings (R. 42, 44–45). The Essex Trust Company assumed the obligation to make such payments and received, in addition to other assets, the proceeds of the loan with which to do so (R. 32). The Corporation agreed to pay no one (R. 60, 61). Hence, if any reformation were to be made, it would have to be made in the arrangements entered into with the Essex Trust Company, and the voluntary discontinuance (R. 57) of petitioner's action against the Trust Company would seem to have resulted in the absence of a necessary party.

Corporation. We submit that these contentions are without merit.

1. The record discloses that the Bank submitted to the Corporation as part of its loan application a schedule of liabilities and a list of creditors which did not include petitioner (R. 34). But the Massachusetts courts both found that there was no intention to defraud the petitioner or any other person since the failure to include petitioner's name as a creditor was apparently due to the fact that the Bank, relying upon advice of counsel, considered petitioner's claim as "dead" and no longer pending (R. 34). Neither the Corporation nor the Essex Trust Company assumed the obligation to pay any creditor of the Bank whose name was not listed in the Bank's schedule of liabilities. Presumably, all known creditors of the Bank, other than depositors, whose claims were certain in amount, were paid before any transfer of assets was made (see R. 33, 35). The Essex Trust Company assumed all listed deposit liabilities, and a special fund of $10,000 was placed on deposit there for the payment of certain claims such as counsel fees, utility bills and secretarial services, which were anticipated but which were uncertain in amount. This fund was not one which was intended to take care of petitioner's claim. (R. 35.) The provisions of the loan agreement between the Federal Deposit Insurance Corporation and the Bank conclusively established that it was intended

for the benefit only of the deposit liabilities (R. 50–56).

In view of the warranties of the Bank as evidenced by the schedule submitted to the Corporation in support of the loan application, the Corporation had a right to rely upon the accuracy of the obligations as represented by the Bank and to make the loan in the sum that it did.[4] Moreover, there is nothing in the record to justify a court in assuming that had the facts been otherwise than as disclosed by the loan application, the Corporation, in the exercise of its discretion, nevertheless would have made the loan in an amount sufficiently large to include petitioner's claim of $100,000.[5] In these circumstances, we submit, no court would be at liberty to draw an inference that provision for the payment of petitioner's claim was omitted from the loan agreement through inadvertence.

The courts below also found that petitioner's claim, which is not a deposit claim, and which did not ripen into a judgment until almost two years after the loan transaction had been concluded, was neither expressly nor impliedly pro-

[4] We do not concede that the loan would have been invalid even if the Corporation had knowledge of petitioner's claim and had deliberately sought to ignore it. That question, however, is not presented in the instant case.

[5] At the time of the loan transaction, petitioner's claim had not yet been reduced to judgment and its only measure available would have been the "ad damnum" of $100,000 (R. 32).

vided for in the loan agreement. They further found that the failure to provide for this claim was deliberate and that it was not due to inadvertence, mistake or error. Consequently, no basis exists for a third party beneficiary suit."

Whatever arrangements were made with the Essex Trust Company are not here subject to revision inasmuch as the Trust Company is no longer a party to this action. The precise transaction which petitioner seeks to have reformed is the application for a loan on the part of the Bank and the loan itself accompanied by the pledge of the Bank's assets. In this particular transaction, there was no undertaking to pay any creditors. It would be an extraordinary interpretation to be placed upon the intention of the parties that the Corporation intended to assume liability to pay petitioner's claim while the liability of every other creditor of the Bank was assumed by the Trust Company. We submit that the court below correctly concluded that there was no intent on the part of the Corporation to assume liability for the payment of petitioner's claim.

" *Forbes* v. *Thorpe*, 209 Mass. 570, relied upon by petitioner (Pet. 10) does not support its argument. That case does not draw any parallel between willful misrepresentation and misconception or mistake. The *ratio decidendi* of the Massachusetts court was that the contract there specifically and very plainly provided for payment of the plaintiff's claim (*id.*, p. 580). In the instant case, the courts have found that the contract between the Bank and the Corporation not only did not so provide but on the contrary, deliberately, and in good faith, omitted to do so (R. 34–35, 61).

2. There is no federal public policy requiring the Federal Deposit Insurance Corporation to make whole all creditors of an insolvent bank or a solvent bank whose business is being liquidated. The power of the Corporation to enter into a loan agreement of the character here involved is conferred by Section 12B (n) (4) of the Federal Reserve Act, *supra*, p. 3. That Act authorizes the Corporation to make loans to an insured bank whenever such action will reduce the risk or avert a threatened loss to the Corporation; to make loans secured in whole or in part by assets of an open or closed insured bank, "which loans may be in subordination to the rights of depositors and other creditors." Any insured national bank is authorized to pledge its assets to secure such loans. There can be no question in the instant case that both the Bank and the Corporation had statutory authority to enter into the loan agreement, although neither was required by law to do so. It was purely a matter of discretion.

It is equally clear that discretion was vested in the board of directors of the Corporation to determine whether the loan was to be subordinated to the rights of depositors and other creditors. As the court below observed (R. 60), this subordination provision is not mandatory. The entire scheme

of federal bank deposit insurance embraces the insurance of deposit liabilities only. Section 12B of the Federal Reserve Act, as amended (12 U. S. C. 264); Cf. *Weir* v. *United States,* 92 F. (2d) 634 (C. C. A. 7), certiorari denied, 302 U. S. 761. The discretionary powers vested in the Corporation under the statutory loan provision are wider in scope than the power to insure deposits. This necessarily is essential in order that the purposes of the Act to insure deposits may be achieved. The Corporation is not limited when making loans to cases of insolvent banks, and the loans may be made "upon such terms and conditions as it [the Corporation] may determine" (see p. 3, *supra*). Inasmuch as the Corporation concerns itself with the insurance of deposits only, a contention that it is required by law to provide for the payment of nondeposit creditors such as petitioner is unfounded. There is nothing to indicate that the Corporation was under any statutory duty whatsoever to petitioner, and the court below so found (R. 63). Accordingly, the contract, which did not provide for subordination of the claims of the Corporation to those of creditors but on the contrary provided for securing the indebtedness to the Corporation, thereby indicating a clear intention not to subordinate the Corporation's claim, conformed in all respects with the provision of the statute. The contract did not in any manner violate the rights of petitioner as a creditor, and in the circumstances we submit that it is in no position

to urge that it was prejudiced by the Corporation's action.[7]

3. The question presented in the instant case is narrow and of no general importance. Admittedly, the Corporation had power to make the loan to the Bank and the Bank had power to pledge its assets to secure that loan (Section 12 B (n) (4) of the Federal Reserve Act, *supra*, p. 3). At the time the loan was made, so far as the record discloses, the Bank was solvent. No receiver has been appointed by the Comptroller of the Currency, and no question of a ratable distribution of the assets of an insolvent bank is involved. The pledge of assets by the Bank and transfer of its deposit accounts and of its liquid assets to the Essex Trust Company were found by the courts

[7] The suggestion (Pet. 3, 6, 12–13) that petitioner will be deprived of its right to a ratable distribution of the Bank's assets has no merit. The record discloses that the Bank is now in voluntary liquidation and its administration is in the hands of liquidating agents (see 12 U. S. C., secs. 181–186). The Federal Deposit Insurance Corporation has no part in the statutory liquidation of the Bank except to the extent that it is liquidating the collateral as pledgee of assets under the loan agreement. No receiver has been appointed. Consequently, the provisions of the National Bank Act of 1864 (12 U. S. C., sec. 194) governing ratable distribution by the Comptroller of the Currency are not before the Court (cf. Pet. 13). Moreover, the Act (12 U. S. C., secs. 181–186) makes no provision for ratable distribution on claims against a bank in voluntary, as dis-

to have been made in good faith for a fair consideration. The only question which possibly can be presented by this record is whether, under the loan agreement between the Bank and the Corporation, the latter undertook to pay petitioner's claim. Concededly, the Corporation did not directly undertake to pay any claim, either of a depositor or of any other creditor. Thus, the sole question decided by the court below was whether the manner in which the Bank and the Corporation entered into the loan agreement, taken in conjunction with ancillary happenings, was sufficient to charge the Corporation with the payment of petitioner's claim. The court below did not fail to follow any applicable federal decision nor did it purport to apply state law in preference to

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tinguished from involuntary, liquidation. *Houston* v. *Drake*, 18 F. Supp. 693 (D. Ariz.), reversed on other grounds, 97 F. (2d) 863 (C. C. A. 9). Whether petitioner will receive its just share is a question which concerns the liquidating agents of the Bank, not the Federal Deposit Insurance Corporation. Since, however, only a solvent bank may go into voluntary liquidation (*City N. B. of Huron* v. *Fuller*, 52 F. (2d) 870 (C. C. A. 8); *Houston* v. *Drake*, *supra*) and since the record discloses that petitioner concedes that the Bank is solvent, there is nothing in the record to show that petitioner will not receive its pro rata share when the liquidating agents conclude their administration. There is evidence that the Bank's equity in the collateral security is substantial (R. 36, 58), and petitioner's rights against the liquidating agents have been specifically preserved (R. 36, 66). Cf. *Pickett* v. *Trixler*, 93 F. (2d) 178, 182 (C. C. A. 7), certiorari denied, 303 U. S. 652.

federal law. The case turns on its own peculiar facts, and insofar as we are aware, no other claim either has arisen or is now pending in respect of a loan made by the Federal Deposit Insurance Corporation which bears any resemblance to the facts in the instant claim.

CONCLUSION

We respectfully submit that the decision of the court below was correct and that its decision involves no federal question of substance or general importance. The petition for a writ of certiorari should therefore be denied.

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